

ENCLOSURE 5

**Revised Proposed Administrative Civil Liability Order
(July 11, 2006)**

10-0072

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION**

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R6T-2006-(PROPOSED)

**ADMINISTRATIVE CIVIL LIABILITY
C. GEOFFREY AND CHRISTINE DAVIS,
HANS AND MARGARET COFFENG, AND PACIFIC BUILT, INC.
FOR VIOLATION OF WASTE DISCHARGE PROHIBITIONS PRESCRIBED IN THE
WATER QUALITY CONTROL PLAN FOR THE LAHONTAN REGION,
FOR THE UNAUTHORIZED DISCHARGE OF UNTREATED DOMESTIC
WASTEWATER TO LANDS BELOW THE HIGH-WATER RIM OF LAKE TAHOE ON
JULY 19, 2005 AT
7770 AND 7780 NORTH LAKE BOULEVARD, KINGS BEACH,
PLACER COUNTY ASSESSOR'S PARCEL NUMBERS 117-180-017 AND -018,
WDID NO. 6A310408003**

The California Regional Water Quality Control Board, Lahontan Region (Water Board), finds:

1. Dischargers

Hans and Margaret Coffeng are the legal owners of Placer County Assessor's Parcel Number 117-180-017. C. Geoffrey and Christine Davis are the legal owners of Placer County Assessor's Parcel Number 117-180-018. Pacific Built, Inc., is a contractor hired by Hans and Margaret Coffeng, and C. Geoffrey and Christine Davis to construct a multiple use pier on their adjoining property line. Property owners who knowingly engage in the activities that lead to a discharge are responsible parties. Pacific Built, Inc., is a responsible party because it caused the discharge. Hans and Margaret Coffeng, C. Geoffrey and Christine Davis, and Pacific Built, Inc., are responsible parties for the discharge, and are hereinafter referred to as the Dischargers.

2. Project

The Dischargers constructed a single multiple-use pier on the shared property line between the two parcels owned by the Coffeng and Davis families. The pier is located in Kings Beach, on the north shore of Lake Tahoe. The Coffengs and Davises obtained permits and approvals for the project, including a Tahoe Regional Planning Agency (TRPA) permit, a Section 401 Certification from the

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NOTE: Changes made between the June 16, 2006 version of the Revised Proposed Administrative Civil Liability Order and this order are shown in ~~strikeout~~ and underline format.

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Water Board, an exemption from the California State Lands Commission, a Stream Bed Alteration Permit from the California Department of Fish and Game, and a General Permit 16 from the U.S. Army Corps of Engineers.

3. Facts

On July 19, 2005, there was a discharge of untreated wastewater (sewage) to Lake Tahoe. The discharge occurred as a result of Pacific Built, Inc., puncturing one of North Tahoe Public Utility District's sewer force mains while driving a pile for a pier support. The calculated discharge volume (wastewater discharged from the force main) is 56,000 gallons.

The punctured force main (discharge point) is located in a beach area below Lake Tahoe's high-water rim. Lands below Lake Tahoe's high-water rim, whether they are beach areas or covered by water, are waters of the United States and of the state. Therefore, all wastewater that escaped from the punctured force main was immediately discharged to waters of the United States and of the state. A portion of the discharge was recovered near the discharge point and returned to the sewage collection system, and the remaining amount flowed directly into the waters of Lake Tahoe.

Five North Lake Tahoe public beaches were closed to the public as a result of the discharge of untreated wastewater. ~~Additionally, all private beaches between the public beaches were closed.~~ Four of the public beaches remained closed for 10 days following the discharge, with the fifth public beach being closed for 16 days following the discharge.

4. Violations

The Dischargers violated the following prohibitions specified in the *Water Quality Control Plan for the Lahontan Region* (Basin Plan), adopted pursuant to Water Code §section 13243.

- A. "The discharge of treated or untreated domestic sewage, garbage or other solid wastes, or any other deleterious material to the surface waters of the Lake Tahoe Basin is prohibited."
- B. "The discharge, attributable to human activities, of solid or liquid waste materials, including soil, silt, clay, sand, and other organic and earthen materials to lands below the high-water rim of Lake Tahoe or within the 100-year floodplain of any tributary to Lake Tahoe is prohibited."

The Dischargers violated the prohibitions cited above when untreated wastewater was discharged to lands below the high-water rim of Lake Tahoe on July 19, 2005. The discharge occurred when the property owners' contractor punctured a sewer force main while constructing the property owners' pier. Waste discharges to lands below the high-water rim of Lake Tahoe constitute discharges to surface waters of the Lake Tahoe Basin. The Water Board did not authorize the discharge.

5. Administrative Civil Liability Authority

The Water Board may impose civil liability for the violations identified in Finding No. 4, pursuant to Water Code section 13350, subdivision (a)(2).

Water Code section 13350, subdivision (a)(2) states,

"Any person who...(2) in violation of any waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state...shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e)."

Water Code section 13050, subdivision (d) states,

"Waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal."

Untreated wastewater (sewage) constitutes a waste as defined by Water Code section 13050, subdivision (d).

6. Factors Affecting the Amount of Civil Liability

Water Code section 13327 requires the Water Board to consider enumerated factors when determining the amount of civil liability to impose under Water Code section 13350. The Water Board considered those factors, discussed below, in determining the amount of the administrative civil liability:

- a. The nature, circumstances, extent, and gravity of the violations;

- i. Lake Tahoe has been designated an Outstanding National Resource Water because of its extraordinary clarity, purity, and deep blue color. However, the Lake's clarity has been decreasing due to nutrient and fine sediment discharges associated with human activities. As a result, Lake Tahoe is listed on the Federal Clean Water Act Section 303(d) list as impaired due to excessive sediment and nutrients. In an effort to protect and restore Lake Tahoe's clarity and high quality, the Water Code requires that all wastewater be collected and disposed of outside the Lake Tahoe Basin (Water Code sections 13950 and 13951), beginning January 1, 1972. This requirement resulted in an effort to install the wastewater collection, treatment, and transportation facilities necessary to comply with Water Code sections 13950 and 13951. More recently, public and private partnerships are in place to invest approximately \$1 billion into Lake Tahoe's restoration through the Environmental Improvement Program (EIP). Millions of additional dollars have been spent to protect Lake Tahoe through similar programs that preceded the 1997 EIP. Wastewater discharges, such as the one subject to this Order, contain relatively minor quantities of nutrients when compared to Lake Tahoe's annual nutrient load. However, ~~the~~ The nutrients from this discharge can still have an localized effect on Lake Tahoe's water quality and clarity, which further increases the already significant challenge of reversing the decades-long decline in Lake Tahoe's famed clarity. This impact justifies a significant liability.
- ii. California Business and Professions Government Code (Title 1, Division 5, Chapter 3.1) S section 4216.2, subdivision(a) states,

"Except in an emergency, every person planning to conduct any excavation shall contact the appropriate regional notification center, at least two working days, but not more than 14 calendar days, prior to commencing that excavation, if the excavation will be conducted in an area which is known, or reasonably should be known, to contain subsurface installations other than the underground facilities owned or operated by the excavator and, if practical, the excavator shall delineate with white paint or other suitable markings the area to be excavated."

Pacific Built, Inc. did not contact Underground Service Alert (USA) North prior to beginning pile-driving activities for the property owners' pier. Therefore, the sewer force main, in addition to any other underground utilities (e.g. natural

gas, electric, telecommunications, water) that could be present at the pier site, were not located and marked prior to beginning pile-driving activities.

Pacific Built Inc. offered testimony that the standard of care for marine contractors working on Lake Tahoe does not include contracting USA. In addition, Pacific Built Inc. offered testimony that it relied on the fact that title reports, consultant's site evaluations and regulatory permits did not identify the location of the sewer force main. However, the title reports would only have revealed easements located on either the Coffeng's or Davis' property. The pier plans indicate the locations of 16 piers, only 2 of which are within the boundaries of either the Coffeng's or Davis' properties.

No evidence or testimony was presented that there were any signs or other markings to signal the presence of a sewer force main beneath the beach. Instead, evidence was presented that there are signs along North Lake Boulevard indicating that the sewer force main could be located along or beneath North Lake Boulevard. One such sign states: "WARNING Force Main Sewer Underground. Before digging in this area, please call NTPUD (916) 546-4212." However, the exact locations and spacing of the signs and their relationship to the Coffeng and Davis properties were not established. Therefore, the Water Board does not believe that the signs provide a rationale for believing that a force main or other utility was not located within the project area.

The discharge could have easily been prevented if Pacific Built, Inc. had made a single, toll-free phone call to Underground Service Alert of Northern California and Nevada (USA North). USA North is the regional notification center for the Kings Beach area that receives requests to locate underground utilities from contractors and other people planning to conduct excavation activities. USA North notifies its participating members, and within 48 hours of USA North receiving the request, the USA participating members will either mark or stake their facilities, provide information, or give clearance to excavate, at a planned excavation site. USA North maintains a toll-free number on its website, www.usanorth.org. The website states, "Every person planning to dig should call USA at 1-800-227-2600."

California Business and Professions Code (Title 1, Division 5, Chapter 3.1) Section 4216.2(a) states:

"Except in an emergency, every person planning to conduct any excavation shall contact the appropriate regional notification center, at least two working days, but not more

than 14 calendar days, prior to commencing that excavation, if the excavation will be conducted in an area which is known, or reasonably should be known, to contain subsurface installations other than the underground facilities owned or operated by the excavator and, if practical, the excavator shall delineate with white paint or other suitable markings the area to be excavated."

- Pacific Built, Inc., did not contact USA North prior to beginning pile-driving activities for the property owners' pier. Therefore, the sewer force main, in addition to any other underground utilities (e.g. natural gas, electric, telecommunications, water) that could be present at the pier site, were not located and marked prior to beginning pile-driving activities.

Case evidence indicates that Thomas J. Ragan (President/RMO of Pacific Built, Inc.) should reasonably have known, based upon his work experience, that sewers mains are located below Lake Tahoe's high-water rim. Therefore, Pacific Built, Inc. should have contacted USA North prior to beginning excavation activities on the property owners' pier project. Pacific Built Inc.'s failure to contact USA North to locate all underground utilities constitutes gross negligence, which deserves a significant liability.

- iii. The discharge incident had a significant impact upon the public's ability to enjoy Lake Tahoe. Water samples collected from beach areas surrounding the spill site had fecal coliform concentrations of up to 35,000 colony-forming units per 100 milliliters (cfu/100ml) as a result of the discharge. The discharge violated the water quality objective for coliform bacteria and resulted in the 10-day closure of four public beaches and the 16-day closure of a fifth public beach. The beach closures had a significant impact on the people and businesses in the area. The discharge, therefore, created conditions that unreasonably affected the public's water contact recreation beneficial use, thus creating a condition of pollution, as defined by Water Code section 13050(l)(1). These conditions justify a significant liability.
- iv. Significant financial resources were spent by agencies responding to the discharge and lost by local businesses as a result of the discharge. The North Tahoe Public Utilities District (NTPUD) expended resources to repair the damaged force main, to isolate and/or eliminate flows discharging from the broken force main, to clean up beach areas contaminated by the untreated wastewater, and to monitor water quality. As of February 28, 2006, NTPUD had reported expending approximately

~~\$248,000. Placer County provided emergency response oversight and environmental health management for the discharge incident. Placer County agencies reported expending a minimum of \$74,000. Businesses suffered economic loss due to reduced tourism resulting from the discharge of untreated wastewater to Lake Tahoe. The North Tahoe Business Association and the Placer County Economic Development Department surveyed area businesses to determine the extent of the economic loss. Placer County reported that local businesses lost approximately \$80,000 as a result of the discharge. Total agency and business impact is reported to be, at a minimum, \$402,000. The financial impact on responding agencies and local businesses justifies a significant liability.~~

- v. The property owners complied with requirements applicable to the permitting process for the construction of the pier.
- vi. The Property owners were not aware of the sewer force main on their property and they had a reasonable basis for believing that there was no sewer force main located on their property given the fact that the title reports did not disclose the existence of a sewer easement and permits obtained from public agencies did not identify this as an issue.
- vii. The Water Board notes that NTPUD did not have a circle clamp available to respond to this incident. If a circle clamp had been available it is likely that the amount of sewage discharged as a result of this incident would have been reduced.
- viii. The Water Board is concerned that many public agencies were on notice that there was a sewer force main buried in the Lake Tahoe shoreline in the area of the project. However, when the property owners obtained permits from the Water Board, TRPA and the U.S. Army Corps of Engineers, the record does not indicate that any of these agencies notified the property owners that a sewer force main could be located in the shorezone. While there is no evidence in the record to suggest that these agencies had an affirmative legal obligation to provide such notification, certainly the public, the property owners and Pacific Built Inc. would have been better served if such notice had been provided by one or more of these public agencies.

Although some of the circumstances noted above provide a basis for a very significant liability, others indicate the need to reduce the liability from the

maximum. Taken as a whole, the above circumstances warrant a significant liability.

b. Whether discharge is susceptible to cleanup or abatement;

According to the testimony at the public hearing, approximately 56,000 gallons of untreated wastewater was discharged from the punctured force main during this incident. Of this amount, it is estimated that 17,000 gallons was not susceptible to cleanup. While the entire discharge went into a "water of the state" a portion of the discharge was recovered prior to mixing with the waters of the Lake Tahoe. The estimated discharge volume that was recovered is 39,000 gallons, which justifies reducing the liability from the maximum amount.

c. The degree of toxicity of the discharge;

There were no analyses performed to determine the degree of toxicity of the discharge. Untreated domestic wastewater contains pathogens that can cause sickness and (rarely) death in humans that ingest or are otherwise exposed to such materials. Bacteriological contamination exceeded standards set for drinking water and water-contact recreation. While not toxic, the discharge did create a condition that is potentially harmful to human health. This human health factor is included in subsection a above. The lack of toxicity data combined with potential harmful effects to human health resulting from the discharge neither justifies nor fails to justify reducing the liability from the maximum amount.

d. Ability to pay;

The property owners did not argue an ability to pay.

Pacific Built, Inc. submitted tax returns and financial statements to suggest an inability to pay. The Prosecution Team did not submit any evidence to contradict the information in the financial records submitted by Pacific Built Inc. This factor does not justify reducing the liability from the maximum amount because the Water Board does not find that the financial information submitted is sufficient to support a finding that Pacific Built, Inc. would be unable to pay.

The Dischargers have not provided adequate financial data to the Water Board to show an inability to pay the proposed liability, which therefore provides no justification to reduce the liability from the maximum amount.

- e. The effect on the Discharger's ability to continue its business;

The property owners do not operate a business on the referenced properties, and therefore, this factor does not affect the amount of liability for the property owners. Pacific Built, Inc. is a private business. Its Responsible Managing Officer (RMO); testified that it could not remain in business if it had to pay a significant penalty, ~~but However~~, Pacific Built, Inc. has not provided ~~adequate sufficient~~ financial data to the Water Board to conclusively demonstrate an inability to continue in business. This factor does not justify reducing the liability from the maximum amount for Pacific Built, Inc.

- f. Any voluntary clean up efforts undertaken by the violator;

~~The project contractor~~, Pacific Built, Inc.; immediately contacted the NTPUD to report the puncture and resulting discharge of untreated domestic wastewater. Pacific Built, Inc. employees provided assistance to the NTPUD to immediately evacuate the beach area and to construct sand berms to divert the discharge to pond areas. Additionally, Pacific Built Inc. employees offered immediate assistance to the NTPUD to excavate around the punctured force main and to install vacuor pumps at the point of puncture (rather than at the containment ponds). NTPUD elected not to accept such assistance. The voluntary efforts by Pacific Built, Inc. to provide assistance to NTPUD justifies reducing the liability from the maximum amount.

- g. History of violations;

The property owners have no recorded prior violations. However, Thomas J. Ragan (President/RMO of Pacific Built, Inc.) was one of the people involved in operating the dredge during the illegal dredging of the Fleur Du Lac marina in 1989.

The lack of history of violations ~~may or may not justify~~ reducing the liability from the maximum amount.

- h. Degree of culpability;

C. Geoffrey and Christine Davis and Hans and Margaret Coffeng are the property owners of the noted properties (see finding No. 1 of this Order) and are also the permit holders for the pier project. They are, therefore, directly and ultimately responsible for all actions related to the pier project.

Pacific Built, Inc. is the contractor hired by the two property owners to construct the pier. Pacific Built, Inc., did not contact USA North prior to commencing excavation activities in order to locate any underground utilities on the properties.

Thomas J. Ragan (President/RMO of Pacific Built, Inc.) has approximately 30 years of work experience within the Lake Tahoe Basin. That experience includes repair work he performed on the Tahoe City Public Utility District's (TCPUD) service laterals, located at Dollar Point on the north shore of Lake Tahoe. The service laterals run down an embankment in Lake Tahoe's backshore to TCPUD's gravity sewer main, located in the Lake's shore zone, below the Lake's high-water rim. The sewer line location is under water when Lake Tahoe reaches its higher water levels. Due to the service laterals' close proximity to Lake Tahoe, the repair work was done with an amphibious vessel that accessed the project site from the Lake. Based upon this experience, Thomas Ragan should have reasonably known that sewer mains are located below the Lake's high-water rim. Based upon this knowledge, despite the fact that Pacific Built was not aware of the location of this specific sewer force main, Pacific Built, Inc. should have notified USA North prior to beginning excavation activities on the property owners' pier project.

Pacific Built, Inc., punctured the NTPUD sewer force main while driving a pile for a pier support. Pacific Built, Inc., is therefore directly responsible for the discharge of untreated wastewater, because it caused the discharge. This discharge incident could have been prevented with Pacific Built, Inc. making a single, toll-free telephone call to USA. The degree of culpability justifies a significant liability.

- i. Economic savings resulting from the violation; and,

No evidence was submitted concerning economic savings resulting from the discharge.

The Water Board staff is unaware of any avoided costs associated with the discharge. The lack of economic savings is a neutral factor in determining the appropriate amount of liability.

- j. Other matters as justice may require.

Water Board staff spent time responding to the incident and preparing the administrative civil liability. Estimated staff costs for incident response and

complaint preparation are \$17,300.

As to the liability of the property owners, private property owners are ultimately responsible for complying with all applicable laws and regulations for projects performed on their property. The Water Board has consistently looked to property owners/permittees for ensuring that their contractors comply with applicable water quality laws and regulations.

As to the liability of the contractor, the public also needs to be able to rely on the expertise of contractors. This is especially true for contractors who work in and around Lake Tahoe; they must know and comply with the applicable construction laws and regulations. They must operate with a high standard of care, given the nature of the resource at stake. In this case, Pacific Built, Inc., failed to meet its obligation when it did not make a toll-free call USA in order to locate underground utilities on the property prior to performing excavation activities. ~~Pacific Built, Inc., did not exercise an appropriate standard of care that property owners expect from their contractors.~~ This factor justifies a significant liability.

7. Civil Liability - California Water Code

For the discharge of wastes to surface waters that violated Basin Plan prohibitions, pursuant to Water Code section 13350, subdivision (a)(2), the Water Board may impose civil liability pursuant to Water Code section 13350, subdivision (e)(2). Water Code section 13350, subdivision (e)(2) states, "The civil liability on a per gallon basis may not exceed ten dollars (\$10) for each gallon of waste discharged."

In this matter, the maximum civil liability under Water Code section 13350, subdivision (e)(2) is \$560,000 for a discharge of untreated wastewater to lands and surface water below the high-water rim of Lake Tahoe on July 19, 2005.

8. Administrative Civil Liability Complaint Issued by Assistant Executive Officer

The Water Board Assistant Executive Officer issued Administrative Civil Liability Complaint No. R6T-2005-0029 to the Dischargers on December 14, 2005. The complaint recommended an administrative civil liability in the amount of \$700,000 for the unauthorized discharge of untreated wastewater to lands and surface water below the high-water rim of Lake Tahoe on July 19, 2005. At the hearing on the matter, in light of evidence that the actual discharge was approximately 56,000 gallons, the Assistant Executive Officer reduced the recommended liability to \$325,000.

9. California Environmental Quality Act

This enforcement action is being taken by the Water Board to enforce provisions of the Water Code and, as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 210000 et seq.) in accordance with California Code of Regulations, Title 14, section 15321.

10. Public Hearing

On May 11, 2006, at the North Tahoe Conference Center, 8318 North Lake Boulevard, Kings Beach, California, after due notice to the Dischargers and other affected persons, the Water Board conducted a public hearing at which representatives of the Dischargers appeared and evidence was received concerning the discharge of untreated domestic wastewater to lands and surface water below the high-water rim of Lake Tahoe on July 19, 2005. On ~~July XX, 2006~~ July 26, 2006, at the City of South Lake Tahoe City Council Chambers, 1901 Airport Road, South Lake Tahoe, California, after due notice to the Dischargers and other affected persons, the Water Board deliberated on the evidence and the factors used in determining the appropriate amount of liability.

11. Amount of Administrative Civil Liability Affirmed by the Water Board

At the ~~July XX, 2006~~ July 26, 2006 public hearing, the Water Board affirmed its staff's revised recommended Administrative Civil Liability of \$325,000 for the discharge of untreated domestic wastewater to lands and surface water below the high-water rim of Lake Tahoe on July 19, 2005. The Water Board is not choosing to apportion fault between Geoffrey and Christine Davis and Hans and Margaret Coffeng and Pacific Built, Inc. pursuant to Water Code section 13327. Either Geoffrey and Christine Davis and Hans and Margaret Coffeng or Pacific Built, Inc. may seek contribution from one another or against any third party in accordance with principles of comparative fault pursuant to Water Code section 13350, subdivision (i).

IT IS HEREBY ORDERED that, pursuant to Water Code section 13350, subdivision (a)(2):

1. Administrative Civil Liability recommended in Complaint No. R6T-2005-0029, which was issued by Robert S. Dodds, Assistant Executive Officer, on December 14, 2005, and revised during the May 11, 2006 public hearing, is hereby affirmed.
2. Administrative Civil Liability is imposed on C. Geoffrey and Christine Davis, Hans

and Margaret Coffeng, and Pacific Built, Inc. in the amount of three hundred and twenty five thousand dollars (\$325,000). The entire amount shall become due and payable on ~~August 25, 2006~~ ~~August XX, 2006~~ ~~[30 days after adoption]~~.

3. If the above civil liability is not received at the Water Board's South Lake Tahoe office by ~~August 25, 2006~~ ~~August XX, 2006~~ ~~[30 days after adoption]~~, this case will be referred to the offices of the California Attorney General for collection.

I, Harold J. Singer, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Lahontan Region, on ~~July 26, 2006~~ ~~July XX, 2006~~.

HAROLD J. SINGER
EXECUTIVE OFFICER

EJT/didT:/Enforcement Orders/ACL/ORDER/Davis-Coffeng Proposed ACL Order, Revised 6-16-06
File Under: 401/Davis & Coffeng Multiple Use Pier/WDID No. 6A310408003

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